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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PINKETTE CLOTHING, INC., a
 California corporation,

Case No. 15-CV-04950-SJO-AJW

Plaintiff,

vs.

COSMETIC WARRIORS LIMITED,
believed to be a United Kingdom limited
company doing business as LUSH
HANDMADE COSMETICS, and DOES 1-
9, inclusive,

Defendants.

**DEFENDANT'S MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S
MOTION TO EXCLUDE EXPERT
TESTIMONY, REPORT, AND
OPINIONS OF EXPERT WITNESS
DR. LEON KAPLAN**

Date: January 24, 2017

Time: 9:00 a.m.

Place: 10C

Complaint Filed: June 30, 2015

Trial Date: January 24, 2017

I. Introduction.

The Court should allow the testimony of Cosmetic Warriors Limited's ("CWL") consumer survey expert, Dr. Leon B. Kaplan ("Dr. Kaplan"), because it is relevant and reliable and will aid the trier of fact. Dr. Kaplan's testimony establishes that the relevant consuming public is likely to believe, for trademark relevant reasons, that: (1) Plaintiff Pinkette Clothing, Inc.'s ("Pinkette") LUSH branded clothing website was from the same company as CWL's LUSH website, (2) that the two websites were from companies that were affiliated or connected, or (3) that Pinkette's Lush website was approved, endorsed or sponsored by CWL's LUSH brand. Dr. Kaplan is qualified as an expert on the topic of consumer perception surveys by virtue of his knowledge, education, and experience. Pinkette does not suggest otherwise. Rather than conduct its own study, Pinkette merely criticizes CWL's consumer study. Pinkette certainly could have conducted its own study. Moreover, Pinkette's criticisms are misplaced. Kaplan's likelihood of confusion survey is based on the universally accepted Squirtco¹ methodology, and his conclusions result from the reliable application of the Squirtco methodology to the facts of this case. The Court should deny Pinkette's motion to exclude Kaplan.

II. Rule 702 And The *Daubert* Standard.

The admissibility of expert testimony is governed by Federal Rule of Evidence 702, which explains: a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify if: (a) the expert's knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert reliably applies the principles and methods to the facts of the case. Fed. R. Evid. 702. Under Rule 403, an expert's testimony may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Doubts concerning whether an expert's testimony will be

¹ *Squirtco v. Seven-Up Co.*, 628 F.2d 1086, 1089 n.4, 1091 (8th Cir. 1980) (assessing likelihood of confusion through survey analysis).

1 useful should be resolved in favor of admissibility. *In re Flashcom, Inc. v. Communs*
 2 *Ventures III, LP (In re Flashcom, Inc.)*, 503 B.R. 99, 124 (C.D. Cal. 2013); *see also Loral*
 3 *Infrared & Imaging Sys. v. ERA Helicopters*, No. 94-55821, 1997 U.S. App. LEXIS 14850,
 4 at *4 (9th Cir. June 17, 1997).

5 **III. Dr. Kaplan's Survey Is Admissible Because Dr. Kaplan Is Qualified As An**
 6 **Expert And Because His Survey Is Based On A Sound Methodology.**

7 CWL retained Dr. Kaplan to commission a study to test whether there is a
 8 measurable level of confusion between Pinkette's LUSH brand and CWL's LUSH brand.
 9 Dr. Kaplan is a highly experienced survey expert and consumer psychologist.
 10 (Consolidated Decl. of Kevin Bringuel dated Dec. 13, 2016 ("Bringuel Decl.") Ex. D at
 11 24-29.) In 1979, Dr. Kaplan founded Princeton Research & Consulting Center, Inc., and
 12 he remains President today. (*Id.* at 24.) Dr. Kaplan has been working as a survey designer
 13 and expert for at least forty-one years. (*See id.*; Decl. of Heather J. Kliebenstein
 14 ("Kliebenstein Decl.") Ex. 13 at 10:4-11:4.) His work has never been excluded by a court.
 15 (Decl. of Dr. Leon Kaplan ¶ 4.)

16 Dr. Kaplan's proposed testimony is summarized in his expert report entitled "A
 17 Study of the Likelihood of Confusion Between Cosmetic Warriors Ltd. and Pinkette
 18 Clothing Inc." (the "Kaplan Study"). (Bringuel Decl. Ex. D at 1.) The studied population
 19 consisted of women between the ages of 18-35 years old who are likely to use the internet
 20 to get information about women's contemporary clothing in the next year. This population
 21 definition is not challenged by Pinkette as it is Pinkette's targeted adult population. In the
 22 study, qualified respondents were first shown the CWL LUSH website
 23 (www.lushusa.com). (*Id.* at 5; Kliebenstein Decl. Ex. 14.) Then, after a series of
 24 distracter questions, respondents were shown an array of three website listings they might
 25 encounter if they did an online search for women's clothing: www.roxy.com,
 26 www.lushclothing.com and www.lacoste.com. (Bringuel Decl. Ex. D at 5-6.) In the
 27 control cell, www.lushclothing.com was replaced with www.luxusclothing.com which was
 28 identical in all respects except for substituting Luxus for Lush. (*Id.* at 6.) Respondents
 were encouraged to click on links if that was what they normally would do. (*Id.* at 12-13.)

1 Clicking on a link would take the respondent to the homepage for Roxy, Lush Clothing, or
 2 Lacoste (in the control group, a link would lead to Luxus Clothing instead of Lush
 3 Clothing). (*Id.*; Kliebenstein Decl. Exs. 15-18.)

4 Respondents were then asked questions relating to source confusion. (Bringuel Decl.
 5 Ex. D at 13-15.) 366 interviews passed quality-control measures, and 183 respondents saw
 6 the test cell (www.lushclothing.com) and 183 respondents saw the control cell
 7 (www.luxusclothing.com). (*Id.* at 18.) Dr. Kaplan's study found that "over one in three
 8 (36.7%) were confused into believing that the Lush Clothing website was for the same
 9 company as the Lush Cosmetics website or the two websites were for companies that were
 10 affiliated or connected or the Lush Clothing website was approved, endorsed or sponsored
 11 by Lush Cosmetics, for trademark relevant reasons." (*Id.* at 3-4.) Some excerpts from
 12 respondents include:

- 13 • Same name
- 14 • It was called lush beauty products if I'm not mistaken I figure both having the
 name lush means same company
- 15 • They are both called Lush. I would wonder if Lush Clothing is part of Lush
- 16 • The same name but different products
- 17 • I thought the first home page was lush (*sic*) cosmetics so i assume they are linked
 possibly? Thought the names were similar
- 18 • Also related to Lush Cosmetics, same company owns them both.
- 19 • Both companies are named Lush. It just makes me think they have different
 categories that they sell.

20 (*Id.* at 20.) This study, conducted according to accepted principles and standards, is
 21 probative of a likelihood of confusion in this case.

22 **IV. Pinkette's Criticisms Of The Kaplan Survey Go To The Weight Of The** 23 **Evidence Accorded To The Survey, Not Admissibility.**

24 "It is notoriously easy for one survey expert to appear to tear apart the methodology
 25 of a survey taken by another." 6 McCarthy on Trademarks and Unfair Competition §
 26 32:178 (4th ed.). As a result, technical deficiencies in survey methodology go to the
 27 weight of the evidence accorded to the survey, not to the survey's admissibility. *Fortune*
 28 *Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt.*, 618 F.3d 1025, 1036 (9th Cir.
 2010) (methodology bears on weight not admissibility); *Clicks Billiards, Inc. v.*
Sixshooters, Inc., 251 F.3d 1252, 1262-63 (9th Cir. 2001) (issues of methodology and

1 survey design go to the weight not admissibility); *Southland Sod Farms v. Stover Seed Co.*,
 2 108 F.3d 1134, 1143 & n.8 (9th Cir. 1997) (same); McCarthy at §§ 32:158, 32:178. Here,
 3 Pinkette's only objection stems from Dr. Kaplan's methodology and survey design, issues
 4 that go to the weight of his survey not admissibility. Pinkette's objections do not support
 5 exclusion and are, at best, proper subjects for cross examination.

6 **A. Online Surveys Are Commonly Accepted.**

7 Underlying Pinkette's criticisms is the online nature of the Kaplan Study. But
 8 online surveys are a commonly-accepted way to survey consumers and evaluate likelihood
 9 of confusion. *E.g.*, *Fortune Dynamic, Inc.*, 618 F.3d at 1037-38 (district court erred in
 10 excluding internet survey because flaws in survey, including fact it was conducted over
 11 internet thereby failing to replicate real world conditions, went to weight); *His & Her*
 12 *Corp. v. Shake-N-Go Fashion, Inc.*, No. 2:11-cv-05323, 2015 U.S. Dist. LEXIS 44874, at
 13 *12-13 (C.D. Cal. March 30, 2015) (admitting internet survey and finding methodology
 14 critiques went to weight); *Active Sports Lifestyle USA LLC v. Old Navy, LLC*, No. 12-
 15 00572, 2013 U.S. Dist. LEXIS 190005, at *39, 48 (admitting internet survey); *Bach v.*
 16 *Forever Living Prods. U.S., Inc.*, 473 F. Supp. 2d 1110, 1115-16 (W.D. Wash. 2007)
 17 (same); McCarthy § 32.165.25. The online format of the Kaplan Study is appropriate
 18 given the prevalence of the internet today. An online survey is particularly appropriate in
 19 this case because both parties market to their customers online, at www.lush.com,
 20 www.lushusa.com and www.lushclothing.com, respectively.

21 **B. Dr. Kaplan's Selection Of The Squirtco Methodology Is Appropriate.**

22 In general, there are two court-endorsed survey formats: the Eveready format and
 23 the Squirtco format. With the Eveready format, a respondent is shown an exemplar of the
 24 defendant's branded product, and then asked "who makes or puts this out", followed by
 25 "why do you say that?" Jerre B. Swan, *Likelihood of Confusion Studies and the Straitened*
 26 *Scope of Squirt*, 98 TMR 739 (2008), at Part II(A). With the Squirtco format, the
 27 respondents are shown both allegedly conflicting marks and asked whether goods bearing
 28 the two conflicting marks came from the same or different sources. McCarthy §
 32.173.50.

1 Here, Kaplan selected the Squirtco methodology because in Kaplan's opinion it
 2 mirrored the online marketplace and because the Eveready design was not appropriate for
 3 a brand that was not top of mind. (Bringuel Decl. Ex. D at 6; Kliebenstein Decl. Ex. 13 at
 4 61:6-24.)

5 The Eveready method is often recommended for use with strong, top of mind
 6 trademarks (i.e., trademarks with high unaided awareness). Swan, *Likelihood of Confusion*
 7 *Studies and the Straited Scope of Squirt*, at Part I. This is because the Eveready survey
 8 does not show respondents the senior mark—the respondent must be able to recall it
 9 internally within their memory. Pinkette's rebuttal expert, Dr. Bruce Isaacson ("Dr.
 10 Isaacson"), agreed. (Bringuel Decl. Ex. F at ¶ 36 ("Eveready format is typically used on
 11 strong brands, meaning brands that have top-of-mind awareness."))

12 The danger in using the Eveready design with marks that are not top of mind among
 13 all consumers is that such a study would underestimate the likelihood of confusion.
 14 Confusion is underreported because respondents may not have the senior user's mark top
 15 of mind, like Revlon or Cover Girl, but may well become confused when reminded of the
 16 brand or when seeing the parties' marks in real life. See Swan, *Likelihood of Confusion*
 17 *Studies and the Straited Scope of Squirt*, at Part III ("The internal search of memory for a
 18 strong brand's schema that exists at the core of an Eveready study is thus hostile to the
 19 general run of marks.").

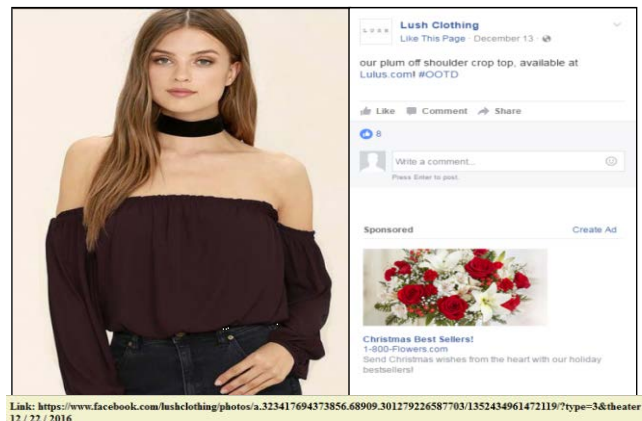
20 Pinkette argues that because CWL contends its LUSH mark is strong, the Kaplan
 21 Study should be an Eveready design. However, just because LUSH is strong does not
 22 mean it is yet top of mind (although that is what CWL aspires for LUSH to be). Very, very
 23 few brands are "top of mind" brands, with high unaided awareness. Examples of such top
 24 of mind marks are Apple, Coke, and Nike. As CWL's marketing expert, Dr.
 25 Joachimsthaler testified, "[V]ery few brands obtain top of mind" and although "many
 26 brands don't obtain top-of-mind awareness, they're still strong brands." (Kliebenstein
 27 Decl. Ex. 12 at 117:19-118:10.) Contrary to Pinkette's position, a mark like LUSH can be
 28 strong yet not an appropriate candidate for an Eveready study. See, e.g., *Roederer v. J.*
Garcia Carrion, S.A., 732 F. Supp. 2d 836, 868, 876 (D. Minn. 2010) (finding Dr.

Kaplan's use of Squirtco style survey appropriate despite finding the senior mark CRISTAL for champagne to be strong); *see also* Swan, *Likelihood of Confusion Studies and the Straitened Scope of Squirt*, at Part III ("Comparatively few have (or can hope to develop) sufficiently strong memory traces so as to be cued by pattern matching engendered by a monadic exposure to a similar junior use."). In this case, use of the Squirtco method is proper, and Dr. Kaplan's testimony should be allowed.

C. The Parties' Products Are Proximate.

Pinkette argues that Dr. Kaplan's survey is improper because the parties' LUSH products are not proximate in the brick and mortar marketplace and that Dr. Kaplan offered no evidence that the parties' goods were "proximate in the real world," presumably limited to brick and mortar shops. (Pinkette Br. (filed under seal) at 4.) Pinkette ignores the design of the Kaplan Study and evidence showing the requisite online proximity. As stated in the Kaplan Study, "the *Squirt* design requires that the plaintiff's and the defendant's products be proximate to each other, either spatially or temporally." (Bringuel Decl. Ex. D at 7.) Here, the evidence shows the parties' marks are proximate to each other, spatially and temporally, both in the online world and in the brick and mortar world.

Both parties operate websites and sell products online. Pinkette's contention that Pinkette does not sell clothes on the internet is not true. (Pinkette Br. at 4.) The attached internet printouts show LUSH clothing for sale on franchescas.com and Nordstrom.com. (Kliebenstein Decl. Exs. 20-21.) Pinkette's Lush Clothing Facebook page advertises its clothing for sale and provides links. Its November 28 and December 13 posts display a "cyber week" sale and clothing for sale on lulu.com:



1 The parties' products and marks coexist on the same Google and Amazon.com search
 2 pages, showing they are a mere click away from one another. (*Id.* at Exs. 22-24; *see also*
 3 *id.* at Ex. 13 at 71:18-72:17; Bringuel Decl. Ex. D at 7 ("Search engines, like Google,
 4 allow marks that are not found on the same website to appear together on the same page as
 5 the result of a search").)

6 The Kaplan Study mirrors this marketplace by evaluating confusion between the
 7 Lush Clothing website and the Lush Cosmetics website for trademark reasons. (Bringuel
 8 Decl. Ex. D at 3-4; Kliebenstein Decl. Ex. 13 at 68:21-69:18.) The Kaplan Study
 9 replicated the online marketplace and showed respondents links to, among others, CWL's
 10 LUSH website and LUSH Clothing's website and allowed the respondents to click those
 11 links and view static screen captures of the relevant website. This design mimicked the
 12 real world online shopping experience in which buyers can choose to click (or not click)
 13 any number of links and can choose to spend as much (or as little time) assessing a website
 14 as they want.

15 Although the Kaplan Study focused on the online world, the evidence also shows
 16 the parties' marks are proximate in the brick and mortar world. Pinkette admits CWL's and
 17 Pinkette's products are sold within the same shopping malls and/or shopping districts.
 18 (Pinkette Br. at 4.) This coexistence establishes proximity. *See Fortune Dynamic, Inc.* 618
 19 F.3d at 1036-38 (proximity found in online survey even where "Delicious" tank tops were
 20 not sold side-by-side or presumably in the same store as DELICIOUS shoes); *Active*
 21 *Sports Lifestyle USA LLC*, 2013 U.S. Dist. LEXIS 190005, at *40-44 (where products
 22 were not sold side-by-side in marketplace, court found Squirt method admissible because
 23 criticism went to weight and noting "consumers are free to roam the on-line and brick-and-
 24 mortar marketplace"); *On Site Energy Co. v. MTU Onsite Energy Corp.*, No. 10-CV-1671,
 25 2012 U.S. Dist. LEXIS 100690, at *8 (E.D.N.Y. July 19, 2012) (finding Squirtco survey
 26 admissible despite objection to proximity because there was evidence that allegedly
 27 infringing marks were in close proximity on a Google search results page and noting the
 28

1 proximity criticism can be raised on cross examination).² Pinkette has no legal authority to
2 the contrary, and its motion should be denied.

3 **V. Dr. Kaplan's Testimony Will Assist The Fact Finder Without Prejudice To**
4 **Pinkette.**

5 Pinkette chose not to conduct its own consumer survey. Arguing prejudice because
6 CWL did conduct a consumer survey is improper. The jury can decide for itself whether
7 Pinkette's weak criticisms carry any weight, and Pinkette has its own rebuttal expert, Dr.
8 Bruce Isaacson, to respond to the study, albeit with no study of his own. Pinkette has not
9 pointed to—and cannot point to—*any specific prejudice* that will result from the admission
10 of the Kaplan Study. There is no risk of jury confusion or prejudice to Pinkette. CWL, on
11 the other hand, would be significantly prejudiced should the Kaplan Study be withheld
12 from the jury. It was conducted pursuant to the proper principles and methodology by a
13 well known, experienced survey expert. CWL has the burden of proof to demonstrate a
14 likelihood of confusion in this case, and the Kaplan Study is an important piece of
15 evidence.

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24 ² The fifteen year old *Simon Property Group L.P.* case, cited by Pinkette, does not
25 support a different conclusion. (Pinkette Br. at 9.) In *Simon*, the Court found that
26 presenting a card depicting images of two website home pages to shoppers in a mall
27 distorted the marketplace experience because it removed other links encountered when
28 searching on the internet and removed additional descriptive information shown
alongside the links. *Simon Prop. Group L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033,
1041, 1044 (S.D. Ind. 2000). The Kaplan Study, on the other hand, was an online
survey that included three other clothing related links aimed at mimicking an online
shopping experience and included the real-world descriptions associated with each link.
(Bringuel Decl. Ex. D at 12-13.)

VI. Conclusion.

For the foregoing reasons, CWL has met its burden to establish the admissibility of Dr. Kaplan's testimony and Pinkette's motion should be denied.

DATED: December 23, 2016

Respectfully submitted,

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